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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re M.D., a Person Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

M.D.,

Defendant and Appellant.

E063668

(Super.Ct.No. SWJ1300315)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Timothy F. Freer, Judge.

Reversed with directions.

Niti Gupta, under appointment by the Court of Appeal, for Defendant and
Appellant.

Gregory P. Priamos, County Counsel, and James E. Brown, Guy B. Pittman, and
Carole Nunes Fong, Deputy County Counsel, for Plaintiff and Respondent.

On May 19, 2015, the juvenile court terminated defendant and appellant, M.D.'s (Father), parental rights as to M.D. (minor born June 2011). On appeal, Father contends insufficient evidence supports the juvenile court's determination that plaintiff and respondent, Riverside County Department of Public Social Services (DPSS), provided adequate notice under the Indian Child Welfare Act (ICWA). (25 U.S.C. § 1901 et seq.) We conditionally reverse the juvenile court's order terminating the parents' parental rights for a limited remand ordering that adequate ICWA notice be provided.

I. FACTUAL AND PROCEDURAL HISTORY

On May 1, 2013, the police were called to the parents'¹ home due to allegations of domestic violence. Father reported the mother had broken into the home, violating a restraining order Father had against her. The home was described as filthy, with trash littering the children's² room. The mother was arrested for violating the restraining order. The mother had previously been arrested on April 26, 2013, for violating the restraining order. The children were taken to the maternal grandmother's home.³

On a prior occasion, the mother had failed to reunify with two of her other children who had both tested positive for drug use at birth. The mother reported using drugs since the age of 10. She had a criminal history, which included being incarcerated

¹ The mother is not a party to this appeal.

² Only minor is a party to this appeal, not his sibling.

³ The children were later placed in a confidential licensed foster home.

for 13 months for assault with a deadly weapon and for being under the influence of a controlled substance. Father had previously been incarcerated for drug offenses.

The social worker went to Father's home on May 7, 2013. The social worker found the mother at Father's house, again in violation of the restraining order. The mother admitted using methamphetamine two days earlier. She confided that she had been diagnosed with bipolar disorder, but had stopped taking her prescribed medications. Father admitted smoking marijuana a few days earlier and tested positive for methamphetamine.

The social worker asked the mother if she was of Native American descent. The mother "stated she has possible Cherokee Native American heritage. [¶] During the previous case the Court found that . . . [ICWA] did not apply as to the mother's children"⁴ Father denied any Indian heritage. On May 10, 2013, the mother filed a parental notification of indian status (ICWA-020 form) indicating she may have Cherokee Indian ancestry. Father filed an ICWA-020 form reflecting he had no Indian ancestry insofar as he knew.

The maternal grandmother was present at the detention hearing on May 10, 2013. The court found ICWA may apply to the proceedings and detained minor.

⁴ We attempted to obtain documentation with which to take judicial notice of any finding by the Los Angeles County Superior Court's determination regarding the applicability of ICWA to previous dependency proceedings regarding minor's siblings. (*In re E.W.* (2009) 170 Cal.App.4th 396, 400-403 [Fourth Dist., Div. Two] [defective ICWA notice as to one sibling is harmless when there has been good ICWA notice as to another sibling who has been found not to be an Indian child].) However, we were unable to obtain any such documentation.

In the jurisdictional/dispositional report filed June 5, 2013, the social worker reported that the parents' parental rights as to a prior child had been terminated on April 30, 2008, in a Los Angeles County case. The mother admitted engaging in domestic violence with Father in front of the children and violating the restraining order (b-1); using methamphetamine, alcohol, and marijuana (b-2); a prior dependency history in Los Angeles (b-3); having unresolved mental health issues (b-4); and having a criminal history (b-5). Father denied any domestic violence in front of the children. Father tested positive on May 20, 2013, for marijuana. The mother failed to test as ordered on May 20, 2013, and tested positive for marijuana on May 29, 2013.

DPSS personnel filed a notice of child custody proceedings for Indian child on June 5, 2013. Notice was sent to the Cherokee Nation of Oklahoma, the Eastern Band of Cherokee Indians, and the United Keetoowah Band of Cherokee (UKBC). The notice indicated no information was available for the parents' addresses despite the notice having been mailed to the parents and the receipt of certified returns from the parents listing their addresses. The notice also reflected no information was available for the maternal grandmother, the maternal grandfather, the maternal great-grandmothers, and the maternal great-grandfathers.

Certified return receipts were received from all three tribes. UKBC responded: "With the information you supplied us, a search of the [UKBC] in Oklahoma enrollment records was conducted. There is no evidence that supports the above referenced

child(ren) is/are descendants from anyone on the Keetoowah Roll, therefore; . . . [UKBC] in Oklahoma will not intervene in this case.”

On June 10, 2013, the juvenile court found ICWA did not apply. In an addendum report filed July 19, 2013, the social worker noted that the mother had been arrested on June 9, 2013, for violation of a court order and vandalism. The mother was outside of Father’s house in violation of the restraining order, knocked his mailbox off its stand, and broke two of his windows. Father tested positive for marijuana on May 29, 30, and June 4, 2013. He failed to show for testing on May 31, 2013. He tested negative on June 11, 17, 18, 25, 26, 29, and July 6, 2013.

The social worker indicated: “On July 15, 2013, I spoke to the maternal grandmother” The maternal grandmother, maternal grandfather, and the maternal aunt appeared at the jurisdiction and disposition hearing on July 24, 2013. The juvenile court sustained the petition, found ICWA may apply,⁵ removed minor from the parents’ custody, and ordered reunification services for the parents.

In the six-month review report filed January 9, 2014, the social worker recommended an additional six months of reunification services. The social worker requested the court find ICWA did not apply: “[DPSS] has not received notice that the child is affiliated with the tribe and therefore, it is recommended that the Court declare

⁵ It is unclear whether the indication in the minute order dated June 10, 2013, that the court found ICWA did not apply, is mistaken. This would appear to be the only rational explanation as DPSS had not requested the court make such a finding at that time and insufficient time had expired for rendering such a finding.

that ICWA does not apply to this case.” The mother reported residing with the maternal grandmother in San Jacinto since October 2013.

The mother tested negative for drugs on November 8, 12, 19, December 3, 16, and 24, 2013. Father had been terminated from a substance abuse treatment program in November 2013 due to noncompliance. Father failed to show for drug testing on October 8, 15, 16, and 24, 2013, and failed to show for treatment groups. The social worker called substance abuse treatment program personnel who agreed to reinstate Father. Father showed for one treatment group, but did not return. The program terminated Father from the program again.

On January 23, 2014, the juvenile court found ICWA did not apply. In an addendum report filed February 13, 2014, the social worker recommended reunification services be continued for Father, but terminated for the mother. The mother had been arrested again on February 4, 2014, and remained incarcerated. As of January 30, 2014, Father had enrolled in another substance abuse program, but had already missed a number of appointments and received a warning letter regarding potential termination. However, Father had reportedly started showing up regularly. On February 19, 2014, the juvenile court continued reunification services for both parents.

In the 12-month review report filed August 5, 2014, the social worker recommended an additional six months of reunification services for Father, but termination of the mother’s services. Father was treated at a hospital on July 9, 2014, under a false name for what the social worker noted appeared to be “multiple bruises,

contusions[,] and abrasions to his face and head” which rendered him “almost unrecognizable.” The only legible words on Father’s discharge paperwork from the hospital noted treatment for “assault.” However, Father insisted he sustained the injuries from a bicycle accident. Father failed to obtain and provide his medical records despite repeated requests by the social worker. The social worker expressed concern for the safety of minor without clarification for what had occurred to Father.

In an addendum report dated September 18, 2014, the social worker recommended termination of reunification services as to both parents. Father had a positive drug test on September 11, 2014. On September 23, 2014, the court terminated the parents’ reunification services.

In the Welfare and Institutions Code section 366.26⁶ hearing report filed January 5, 2015, the social worker recommended termination of the parents’ parental rights. Father had reportedly canceled scheduled visits with minor and failed to show for others on a few occasions. When Father did visit, his interaction with minor was described as minimal. The mother visited minor once during the reporting period.

On January 20, 2015, the court continued the matter to permit a relative assessment for placement of minor with the paternal aunt. Placement with the paternal aunt was later denied. On May 19, 2015, the court terminated the parents’ parental rights.

⁶ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

II. DISCUSSION

Father contends insufficient evidence supports the juvenile court's inherent finding that ICWA notice was legally adequate. We agree.

Notice of the proceedings is required to be sent whenever it is known or there is reason to know that an Indian child is involved. (25 U.S.C. § 1912(a); Welf. & Inst. Code, § 224.2, subd. (a); see *In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) Notice serves a twofold purpose: “(1) it enables the tribe to investigate and determine whether the minor is an Indian child; and (2) it advises the tribe of the pending proceedings and its right to intervene or assume tribal jurisdiction.” (*In re Desiree F.*, *supra*, at p. 470.)

In addition to the child's name, and date and place of birth, if known, the notice is required to include the “name of the Indian tribe in which the child is a member or may be eligible for membership, if known.” (§ 224.2, subd. (a)(5)(B).) The notice is also required to contain “[a]ll names known of the Indian child's biological parents, grandparents, and great-grandparents, . . . as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known.” (§ 224.2, subd. (a)(5)(C).) “A ‘social worker has “a duty to inquire about and obtain, if possible, all of the information about a child's family history”” required under regulations promulgated to enforce ICWA. [Citation.]” (*In re Robert A.* (2007) 147 Cal.App.4th 982, 989.) “ICWA notice requirements are strictly construed and must contain enough information to be meaningful. [Citation.]” (*In re J.M.* (2012) 206 Cal.App.4th 375, 380.)

Juvenile courts and child protective agencies have “an affirmative and continuing duty to inquire whether a [dependent] child . . . is or may be an Indian child.” (*In re H.B.* (2008) 161 Cal.App.4th 115, 121; § 224.3; Cal. Rules of Court, rule 5.481.) As soon as practicable, the social worker is required to interview the child’s parents, extended family members, the Indian custodian, if any, and any other person who can reasonably be expected to have information concerning the child’s membership status or eligibility. (§ 224.3, subd. (c); *In re Shane G.* (2008) 166 Cal.App.4th 1532, 1539; Cal. Rules of Court, rule 5.481(a)(4).) “The [trial] court must determine whether proper notice was given under ICWA and whether ICWA applies to the proceedings. [Citation]. We review the trial court’s findings for substantial evidence. [Citation.]’ [Citation.]” (*In re Christian P.* (2012) 208 Cal.App.4th 437, 451.) “A notice violation under ICWA is subject to harmless error analysis. [Citation.]” (*In re Autumn K.* (2013) 221 Cal.App.4th 674, 715.)

Here, insufficient evidence supported the court’s inherent determination that the ICWA notification was adequate because the notice left substantial information listed as unavailable when that information was clearly available to DPSS. First, the notice listed the parents’ addresses as unknown even though a proof of service attached to that very notice listed the parents’ addresses and DPSS received certified, return receipts of service to those addresses.

Second, the notice filed on June 5, 2013, indicated all information regarding the maternal grandmother, including her name and address were unavailable. However, at

the time the notice was mailed, it was known to DPSS personnel that minor had initially been placed with the maternal grandmother and the maternal grandmother had been present at the detention hearing on May 10, 2013. Thus, the social worker had ample opportunity to obtain, at the very least, the maternal grandmother's name, address, and birth date. Moreover, DPSS personnel could have questioned the maternal grandmother regarding information about the mother's additional lineage and any Indian ancestry, but apparently failed to do so.

Third, DPSS personnel failed to fulfill their continuing duty to inquire regarding information about minor's possible Indian ancestry. Although the initial ICWA notice had already been mailed, the maternal grandmother was subsequently interviewed by the social worker on July 15, 2013. However, the social worker apparently failed to question the maternal grandmother regarding any relevant ICWA information, including the maternal grandmother's name, address, and birth date. Likewise, the maternal grandmother, the maternal grandfather, and the maternal aunt all appeared at the hearing on July 24, 2013. Again, DPSS personnel apparently failed to inquire of the family members present any information relevant to ICWA. Thus, substantial evidence fails to support the court's implied determination that ICWA notice was adequate.

DPSS contends any error was harmless. We disagree. Here, UKBC specifically responded that it could not make a determination of minor's descent from anyone belonging to the tribe "[w]ith the information you supplied us" Thus, it is distinctly possible that with the information that was already readily available, in addition to

information that could have subsequently been obtained, UKBC, as well as the other tribes, could have made a definitive determination regarding minor's descent from those tribes.

III. DISPOSITION

The orders terminating parental rights and ordering adoption as the permanent plan for minor are conditionally reversed and a limited remand is ordered as follows: Upon remand, the juvenile court shall direct DPSS to make further inquiries regarding minor's maternal Indian ancestry, if any, pursuant to section 224.1 and send ICWA notices containing any additional information obtained to all relevant tribes and the Bureau of Indian Affairs in accordance with ICWA and California law. DPSS shall thereafter file certified mail, return receipts for the ICWA notices, together with any responses received. If no responses are received, DPSS shall so inform the juvenile court.

The juvenile court shall determine whether the ICWA notices and the duty of inquiry requirements have been satisfied and whether minor is an Indian child on his maternal side. If the juvenile court finds minor is not an Indian child on his maternal side, it shall reinstate the orders terminating parental rights and placing minor for adoption. If the court finds minor is an Indian child on his maternal side, it shall conduct all further proceedings in compliance with the ICWA and related California law.

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HOLLENHORST
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.